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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
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9 **ROBERT LIONEL SANFORD,**

10 Plaintiff,

11 v.

12 **DOE, DIRECTOR OF DEPARTMENT OF**  
13 **CORRECTIONS, L. E. SCRIBNER, Warden, et al.**

14 Defendant.  
15

Case No. 08cv1049 H (PCL)

**REPORT &  
RECOMMENDATION ON  
DEFENDANTS' MOTIONS TO  
DISMISS AND PLAINTIFF'S  
MOTION TO AMEND NAME  
ON COMPLAINT**

16 **I.**

17 **INTRODUCTION**

18 Plaintiff Robert Lionel Sanford ("Plaintiff") is a state prisoner proceeding *pro se* and *in*  
19 *forma pauperis* with an action filed pursuant to 42 U.S.C. § 1983. Plaintiff alleges Defendants  
20 violated his civil rights by refusing him proper medical care while he was an inmate at Calipatria  
21 State Prison and by interfering with his inmate grievance process at Ironwood State Prison.  
22 (Doc. No. 1.) The case is before the undersigned pursuant to S.D. Cal. Civ. R. 72.1(c)(1)(c) for  
23 Report and Recommendation on Defendants' Motions to Dismiss (Doc. Nos. 14 and 23) and  
24 Plaintiff's Motion to Amend Name on Complaint (Doc. No. 17). Based upon the documents  
25 presented in this case, and for the reasons set forth below, the Court recommends the Motion to  
26 Dismiss all named Defendants be DENIED in part and GRANTED in part and the Motion to  
27 Dismiss Defendant Doe be GRANTED. The Court also recommends Plaintiff's Motion to  
28 Amend Name on Complaint be DENIED.

1 **II.**

2 **BACKGROUND**

3 On June 18, 2007, while incarcerated at Calipatria State Prison, Plaintiff underwent a  
 4 tonsillectomy and elective surgery to remove nasal polyps at Alvarado Hospital in San Diego,  
 5 California. (Doc. No. 1 Compl. at 43.)<sup>1/</sup> During recovery from surgery, at approximately 6:00  
 6 p.m. on June 26, 2007, Plaintiff alleges he began “hemorahaging [sic] from surgery that  
 7 ruptured.” (*Id.* at 28, 38.) Plaintiff contends he notified prison staff of the situation and “it took  
 8 over 45 minutes before medical staff responded.” (*Id.*) Plaintiff was taken to the hospital ward  
 9 at the prison where Licensed Vocational Nurse (“LVN”) Sowell was on duty and attempted to  
 10 keep Plaintiff’s bleeding under control. (*Id.* at 14, 29.) Plaintiff states he bled through the night  
 11 and although “it was clear to LVN Sowell that Plaintiff was severely suffering and LVN Sowell  
 12 could not offer or help provide necessary treatment to stop the hemorrhage[,] LVN did have  
 13 authority for the welfare and safety of inmates in her care to call transportation to have Plaintiff  
 14 sent to outside hospital, but she refused to make the judgment for unknown reasons.” (*Id.* at 14.)  
 15 Plaintiff also alleges Nurse Practitioner (“NP”) Thomas “told Nurse Sowell over the phone to  
 16 hold [Plaintiff] at prison for unknown reason.” (*Id.* at 15.) NP Thomas arrived the morning of  
 17 June 27, 2007 to begin her shift at the prison medical ward and ordered Plaintiff sent to  
 18 Pioneer’s Memorial Hospital in Brawley, California where Plaintiff was admitted to the  
 19 emergency room to have the surgery repaired. (*Id.* at 14-15.)

20 Unrelated to the medical incident, Plaintiff was transferred to Ironwood State Prison on  
 21 July 11, 2007. (*Id.* at 30.) On or about February of 2008, Plaintiff began filing a series of CDC  
 22 602 Inmate Appeal Forms. (*Id.* at 23.) The grievances centered around the medical incident at  
 23 Calipatria State Prison. (*Id.*) The fact that the incident occurred at Calipatria Prison, coupled  
 24 with the time lapse between the incident and the filing of grievance forms prompted the  
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 28 1. The Complaint’s original pagination is erratic and incomplete. (See Doc. No. 1.) For  
 clarity, the Court’s citations refer to the page numbers assigned by the docketing clerk.

1 Ironwood Prison Appeals Coordinators D. Holbrook and L. Bonnett to “screen out”<sup>2/</sup> his appeals.  
 2 (Id. at 25-26.)

3 Plaintiff filed the instant Complaint on June 11, 2008 alleging deliberate indifference to  
 4 his medical needs by Calipatria Prison medical staff and due process violations stemming from  
 5 the actions of the Appeals Coordinators at Ironwood Prison. (Id. at 4-5.) Plaintiff names the  
 6 following parties as Defendants to each of his claims. Defendants Sowtell, Thomas, Levin and  
 7 Scribner are allegedly liable for the first claim while Defendants Holbrook, Bonnet and Dexter  
 8 are liable for the second claim. (Id. at 2-3.) Defendants Scribner and Dexter are Wardens of  
 9 Calipatria Prison and Ironwood Prison, respectively. (See id.) Additionally, Plaintiff alleges  
 10 Defendant Doe is liable for all claims in his capacity as Director of the California Department of  
 11 Corrections. (Id. at 2.)

12 Defendants filed a Motion to Dismiss on November 6, 2008 for failure to state a claim as  
 13 to all named Defendants. (Doc. No. 14.) Plaintiff then filed a Motion to Amend Name on  
 14 Complaint seeking to substitute Matthew Cate<sup>3/</sup> as Defendant Doe. (Doc. No. 17.) On  
 15 November 25, 2008, Defendants filed a second Motion to Dismiss for failure to state a claim  
 16 against Defendant Doe or, in the alternative, Matthew Cate. (Doc. No. 23.) Plaintiff responded  
 17 in opposition to the Motions on December 10, 2008 and December 29, 2008. (Doc. Nos. 27, 29.)  
 18 By Order dated November 17, 2008, the pending Motions were referred to the undersigned for  
 19 recommendation. (Doc. No. 20.)

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26 2. The process of screening out an appeal entails refusing to give the appeal a log number  
 27 and declining to pursue or investigate the claim further.

28 3. Matthew Cate is the current Director of the California Department of Corrections and  
 Rehabilitation.

1 **III.**

2 **STANDARD OF REVIEW—RULE 12(b)(6)**

3 A trial court may dismiss a claim upon motion of the Defendants pursuant to Fed. R. Civ.  
 4 P. 12(b)(6) for “failure to state a claim upon which relief can be granted.” See Wong v. Bell,  
 5 642 F.2d 359, 361-62 (9th Cir. 1981). A complaint should not be dismissed under the rule  
 6 “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim  
 7 which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Amfac  
 8 Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426, 429-30 (9th Cir. 1978). The court  
 9 must accept all factual allegations pled in the complaint as true, and must draw all reasonable  
 10 inferences in favor of the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336,  
 11 337-38 (9th Cir. 1996); Mier v. Owens, 57 F.3d 747, 750 (9th Cir. 1995) (citing Usher v. City of  
 12 Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Moreover, the court will “‘presume that general  
 13 allegations embrace those specific facts that are necessary to support the claim.’” Nat’l Org. For  
 14 Women v. Scheidler, 510 U.S. 249, 256 (1994) (quoting Lujan v. Defenders of Wildlife, 504  
 15 U.S. 555, 561 (1992)).

16 If a complaint is accompanied by attached documents, the court is not limited by the  
 17 allegations contained in the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th  
 18 Cir. 1987) (citing Amfac Mortgage Corp., 583 F.2d at 429). These documents are part of the  
 19 complaint and may be considered in determining whether Plaintiff can prove any set of facts in  
 20 support of the claim. Id. Additionally, *pro se* pleadings are held to a less stringent standard than  
 21 those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972).

22 However, in spite of the deference the Court is bound to pay to Plaintiff’s allegations, it is  
 23 not proper for the court to assume that “the [plaintiff] can prove facts which [he or she] has not  
 24 alleged.” Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519,  
 25 526 (1983). Moreover, a court is not required to credit conclusory legal allegations cast in the  
 26 form of factual allegations, unwarranted deductions of fact, or unreasonable inferences. Sprewell  
 27 v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Western Mining Council v. Watt,  
 28 643 F.2d 618, 624 (9th Cir. 1981).

1 IV.

2 DISCUSSION

3 A. Motion to Dismiss Claims Against Named Defendants

4 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
5 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived  
6 the claimant of some right, privilege or immunity protected by the Constitution or laws of the  
7 United States. See 42 U.S.C. § 1983 (LEXIS 2008); Parratt v. Taylor, 451 U.S. 527, 535 (1981)  
8 (overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 328 (1986)); Haygood v.  
9 Younger, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

10 A person deprives another of a constitutional right “where that person does an affirmative  
11 act, participates in another’s affirmative acts, or omits to perform an act which [that person] is  
12 legally required to do that causes the deprivation of which complaint is made.” Hydrick v.  
13 Hunter, 500 F.3d 978, 988 (9th Cir. 2007) (quotations omitted). “[T]he ‘requisite causal  
14 connection can be established not only by some kind of direct, personal participation in the  
15 deprivation, but also by setting in motion a series of acts by others which the actor knows or  
16 reasonably should know would cause others to inflict the constitutional injury.’” Id. (quoting  
17 Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1991)).

18 Plaintiff’s Complaint sets forth two claims: deliberate indifference to his medical needs  
19 during a medical emergency on June 26, 2007 by Defendants LVN Sowell, NP Thomas, Dr.  
20 Levin and L. E. Scribner; and deprivation of his right to due process in the processing of his  
21 inmate grievance forms by Defendants D. Holbrook, L. Bonnett, and D. Dexter.<sup>4/</sup> (Doc. No. 1  
22 Compl. at 2-5.) Defendants move for dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), on the  
23 grounds that plaintiff has failed to state a claim upon which relief can be granted against all  
24 named Defendants. (Doc. No. 17).

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27 4. The merits of Defendants’ Motion to Dismiss Defendant Doe as the Director of the  
28 California Department of Corrections are discussed in a later section as part of Defendants’ second  
Motion to Dismiss.

1           **1.       Eleventh Amendment**

2           Defendants first argue that the Complaint should be dismissed under Eleventh  
3 Amendment principles to the extent Plaintiff pleads claims against them in their official  
4 capacities. However, the bar on suits under § 1983 against state officials in their official  
5 capacities applies only to those seeking money damages. See Will v. Michigan Dep't of State  
6 Police, 491 U.S. 58, 71 (1989). The Eleventh Amendment does not proscribe actions for  
7 injunctive relief against such defendants or actions for damages against state officials acting in  
8 their personal capacity. See Will, 491 U.S. at 71 n.10; Hafer v. Melo, 502 U.S. 21, 31 (1991). In  
9 this action, Plaintiff seeks injunctive relief as well as compensatory and punitive damages.<sup>5/</sup>  
10 (Doc. No. 1 Compl. at 8). Upon review of the merits of Plaintiff's claims, Plaintiff may possibly  
11 be entitled to injunctive relief. Accordingly, the Court recommends Defendants' Motion to  
12 Dismiss be GRANTED as to any claims for monetary damages against Defendants acting in  
13 their official capacities.

14           **2.       Deliberate Indifference to Serious Medical Needs**

15           The Eighth Amendment prohibits punishment that involves the "unnecessary and wanton  
16 infliction of pain." Estelle v. Gamble, 429 U.S. 97, 103 (1976) (quoting Gregg v. Georgia, 428  
17 U.S. 153, 173 (1976)). Prison officials violate a prisoner's Eighth Amendment right to be free  
18 from cruel and unusual punishment if they are deliberately indifferent to the prisoner's serious  
19 medical needs. Estelle, 429 U.S. at 106; Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir.  
20 1989). The test for deliberate indifference consists of two parts. McGuckin v. Smith, 974 F.2d  
21 1050, 1059 (9th Cir. 1992) (overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d  
22 1133 (9th Cir. 1997)). First, there must be a serious medical need which could lead to further  
23 injury or "unnecessary and wanton infliction of pain." Jett v. Penner, 439 F.3d 1091, 1096 (9th  
24 Cir. 2006). A serious medical need is "an injury that a reasonable doctor or patient would find

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26           5. Plaintiff's Complaint does not indicate whether Defendants are sued in their official or  
27 individual capacity. With the exception of Defendants Doe and Scribner, neither box on pages two  
28 or three of the Complaint is checked as to the other Defendants. (See Doc. No. 1 Compl. at 2-3.)  
However, because the Court liberally construes Plaintiff's claims, it is assumed Plaintiff intended  
to sue Defendants in both their individual and official capacities.

important and worthy of comment or treatment.” McGuckin, 974 F.2d at 1059. Second, the plaintiff must show that prison officials responded to the plaintiff’s serious medical need with “deliberate indifference.” Jett, 439 F.3d at 1096. Prison officials demonstrate deliberate indifference when they are aware of a prisoner’s condition but “deny, delay, or intentionally interfere with medical treatment.” Id. (internal citations omitted). In sum, a prison official is deliberately indifferent only if he knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

Further, the prisoner must allege harm caused by the deliberate indifference. A mere delay in treatment does not constitute a violation of the Eighth Amendment, unless the delay or denial was harmful. See McGuckin, 974 F.2d at 1060. The Eighth Amendment is violated if “delays occurred to patients with problems so severe that delays would cause significant harm and that Defendants should have known this to be the case.” Hallett v. Morgan, 287 F.3d 1193, 1206 (9th Cir. 2002).. To establish a claim of deliberate indifference arising from delay, a plaintiff must show that the delay caused further harm. Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990). “Harm” may include significant pain that otherwise need not have been endured, even without physiological damage. See Shapley v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam).

a. *LVN Sowntell*

Plaintiff’s complaint specifically alleges he suffered a massive and serious medical emergency” on June 26, 2007. (Doc. No. 1 Compl. at 9.) At the onset of the injury, Plaintiff began “coughing up blood clots and bleeding profusely from the nose, mouth and eyes. (Id. at 13-14.) Once Plaintiff was taken to the prison medical unit, Plaintiff states LVN Sowntell was the “intensive care LVN handling this hemorrhage.” (Id. at 14.) Plaintiff contends that although “it was clear to LVN R. Sowntell that Plaintiff was severely suffering and LVN Sowntell could not offer or help provide necessary treatment to stop the hemorrhage,” she did not take appropriate steps to seek adequate medical care for Plaintiff such as sending him to a hospital for emergency procedures. (Id.)

1 To survive a Motion to Dismiss, Plaintiff must allege both serious medical need and  
 2 deliberate indifference. Jett, 439 F.3d at 1096 (internal citations and quotations marks omitted).  
 3 Clearly, Plaintiff alleges serious medical need; therefore, the Court’s analysis turns to the  
 4 deliberate indifference prong. This prong is satisfied by showing that prison officials were  
 5 aware of the prisoner’s condition but denied, delayed, or intentionally interfered with medical  
 6 treatment.” (Id.)

7 Plaintiff alleges facts satisfying both prongs of the test. First, Plaintiff alleges he was  
 8 taken to the prison medical ward at Calipatria prison on the evening of June 26, 2007 and had  
 9 direct contact with LVN Sowell there. As such, LVN Sowell inevitably would have seen  
 10 Plaintiff bleeding during the 12 hours he alleges he was hemorrhaging. Plaintiff also alleges  
 11 LVN Sowell knew of his condition because she called NP Thomas regarding the situation and  
 12 recorded her observations on standard medical progress forms. (Doc. No. 1 Compl. at 86-89.)  
 13 Notwithstanding this knowledge, she failed to summon further medical attention or offer pain  
 14 relief. Plaintiff also satisfied the second prong by alleging this indifference delayed medical  
 15 care, exacerbated his injury and caused him to suffer “blood disorders that may have been  
 16 caused from the massive hemorrhage.” (Id. at 12.) Accordingly, the Court recommends the  
 17 Motion to Dismiss be DENIED as to Defendant LVN Sowell.

18 b. *NP Thomas*

19 Plaintiff also contends that NP Thomas denied him adequate medical care prior to  
 20 sending him to a hospital on June 27, 2007. (Id. at 14-15.) Plaintiff’s allegations with respect to  
 21 NP Thomas, while not particularly well-pled, are adequate to survive a motion to dismiss with  
 22 respect to contributing to the delay of adequate medical care. Plaintiff sufficiently alleges NP  
 23 Thomas was deliberately indifferent. Deliberate indifference requires “(a) a purposeful act or  
 24 failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by the  
 25 indifference.” Jett, 439 F.3d at 1096. Plaintiff alleges NP Thomas knew of his injury by virtue  
 26 of being contacted by LVN Sowell regarding the situation and failed to respond to Plaintiff’s  
 27 emergency by telling LVN Sowell over the phone to “hold” Plaintiff at the prison. (Doc. No. 1  
 28 Compl. at 15.) Allegedly, NP Thomas could have allowed LVN Sowell to send Plaintiff to a



1 hospital for more appropriate medical care but affirmatively failed to do so. Further, Plaintiff  
 2 alleges NP Thomas' actions caused harm including "medical complications" and blood disorders  
 3 which developed following the medical emergency. (*Id.* at 13.) Therefore, the Court  
 4 recommends the Motion to Dismiss be DENIED as to Defendant NP Thomas.

5 c. *Dr. Levin*

6 Plaintiff argues Dr. Levin is "legally responsible for all overall medical operations at  
 7 Calipatria State Prison also for all inmates[sic] welfare under medical care at Calipatria State  
 8 Prison." (*Id.* 2.) However, Plaintiff fails to state a claim against Dr. Levin in his complaint  
 9 because he has failed to allege personal involvement in his constitutional deprivation claim. *See*  
 10 *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). There is no respondeat superior liability  
 11 under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). As a  
 12 supervisor, a Defendant may only be held liable for the allegedly unconstitutional violations of  
 13 his subordinates if Plaintiff alleges specific facts which show: (1) how or to what extent this  
 14 supervisor personally participated in or directed Defendants' actions, and (2) in either acting or  
 15 failing to act, the supervisor was an actual and proximate cause of the deprivation of his  
 16 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

17 In the instant case, Plaintiff does not allege any facts which constitute personal acts  
 18 committed by Dr. Levin. Absent any such allegations, the Court recommends the Motion to  
 19 Dismiss be GRANTED, without prejudice, as to Defendant Levin. However, because Plaintiff  
 20 could possibly cure the defects of pleading identified in this Recommendation as to Dr. Levin, it  
 21 is also recommended he be granted an opportunity to amend.<sup>6/</sup> *Lopez v. Smith*, 203 F.3d 1122,  
 22 1127 (9th Cir. 2000) (leave to amend is generally appropriate unless the court has determined  
 23 "that the pleading could not possibly be cured by the allegation of other facts.").

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 25 6. A court may dismiss a complaint without granting leave to amend only if it appears with  
 26 certainty that the plaintiff cannot state a claim and any amendment would be futile. *See* Fed. R. Civ.  
 27 P. 15(a) (leave to amend "shall be freely given when justice so requires"); *DeSoto v. Yellow Freight*  
 28 *Systems, Inc.*, 957 F.2d 655, 658 (9th Cir.1992); *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir.  
 1988); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)  
 ("leave to amend should be granted unless the court determines that the allegation of other facts  
 consistent with the challenged pleading could not possibly cure the deficiency.").

d. *Warden Scribner*

Plaintiff seeks to hold Warden L. E. Scribner liable in his supervisory capacity for Plaintiff's claims that he was injured and denied adequate medical care at Calipatria State Prison. (Doc. No. 1 Compl. at 2.) However, there is no respondeat superior liability under 42 U.S.C. § 1983. Palmer, 9 F.3d at 1437-38. Instead, "[t]he inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (citing Rizzo v. Goode, 423, U.S. 362, 370-71 (1976)).

As currently pled, however, Plaintiff's Complaint in no way sets forth facts which might be liberally construed to support an individualized constitutional claim against the warden of Calipatria Prison. Therefore, the Court recommends the Motion to Dismiss be GRANTED as to Defendant Scribner.

**3. Due Process Violation**

Defendants argue Plaintiff has failed to state a claim against D. Holbrook, L. Bonnett and Warden Dexter in the context of the prison grievance procedure at Ironwood State Prison. (See Doc. No. 23.) To the extent Plaintiff intends to state due process claims against Holbrook and Bonnett<sup>7</sup> for denying his appeals, Defendants are correct. Prisoners do not have a "separate constitutional entitlement to a specific prison grievance procedure." Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988)). Specifically, a failure to process a grievance does not state a constitutional violation. Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993). Even the non-existence of, or the failure of prison officials to properly implement, an administrative appeals process within the prison system does

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7. Plaintiff's claim against Warden Dexter rests solely on her role as warden of Ironwood State Prison. (Doc. No. 1 Compl. at 2.) As with Warden Scribner, Plaintiff's Complaint in no way sets forth facts which might be liberally construed to support an individualized constitutional deprivation claim against Warden Dexter. The law does not support respondeat superior liability under 42 U.S.C. § 1983. Palmer v. Sanderson, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Therefore, even if Plaintiff could make a viable claim against Defendants Holbrook and Bonnett, the Court recommends any claim against Warden Dexter be dismissed pursuant to Rule 12(b)(6).

not raise constitutional concerns.<sup>8/</sup> Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988); see also Buckley, 997 F.2d at 495. State regulations give rise to a liberty interest protected by the Due Process Clause of the federal constitution only if those regulations pertain to “freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418 (1995).

Plaintiff has failed to allege any facts from which the Court could find there were atypical and significant hardships imposed upon him as a result of improper handling of internal grievance procedures. As there is no cause of action for the failure to adjudicate an inmate’s grievances, the Court finds that Plaintiff has failed to allege a protected liberty interest and as a result, failed to state a due process claim.<sup>9/</sup> See May v. Baldwin, 109 F.3d 557, 565 (9th Cir. 1997); Sandin, 515 U.S. at 486. Therefore, the Court recommends Defendants’ Motion to Dismiss claims against Defendants Holbrook, Bonnett and Dexter be GRANTED.

**B. Motion to Dismiss Claims Against Defendant Doe**

Plaintiff alleges Defendant Doe is liable for Plaintiff’s injuries by virtue of his position as the Director of the California Department of Corrections (CDC). Essentially, Plaintiff is suing Defendant Doe in his supervisory capacity as the party responsible for the “overall operation of Department and each institution under its jurisdiction.” (Doc. No. 1 Compl. at 2.) However, the Director of the CDC cannot be held liable under a respondeat superior theory under 42 U.S.C. § 1983. See Palmer, 9 F.3d at 1437-38. To avoid the respondeat superior bar, the plaintiff must allege personal acts by the defendants which have a direct causal connection to the constitutional violation at issue. See Sanders v. Kennedy, 794 F.2d 478, 483 (9th Cir. 1986); Paine v. City of

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8. See also Azeez v. De Robertis, 568 F. Supp. 8, 10 (N.D.Ill. 1982) (“[A prison] grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates. Hence, it does not give rise to a protected liberty interest requiring the procedural protections envisioned by the fourteenth amendment.”)

9. The fact that there is no effective grievance system for inmates at Ironwood State Prison may be sufficient to defeat a motion to dismiss the complaint if the issue were Plaintiff’s failure to exhaust administrative remedies. See 42 U.S.C. § 1997e(a), However, in the context of Plaintiff’s allegations, it does not give rise to an independent cause of action.

Lompoc, 265 F.3d 975, 984 (9th Cir. 2001) (whether or not each defendant “is a participant in the incidents that could give rise to liability” is a necessary element of the § 1983 claim). Since no direct participation is alleged by Defendant Doe, the Court recommends the Motion to Dismiss be GRANTED as to Defendant Doe.

**C. Motion to Amend Name on Complaint**

As discussed in the preceding section, Plaintiff can make no claim against Defendant Doe (or Mathew Cate) solely for his role as Director of the CDC. Under that premise, it appears granting Plaintiff leave to amend his complaint solely to substitute Matthew Cate for John Doe would be futile if his complaint fails to state an individualized claim of liability against the Director anyway. See Palmer, 9 F.3d at 1437-38 (there is no respondeat superior liability under 42 U.S.C. § 1983).

Therefore, the Court recommends Plaintiff’s Motion to Amend Name on Complaint be DENIED. Vasquez v. Los Angeles County, 487 F.3d 1246, 1258 (9th Cir. 2007) (citing Schmier v. U.S. Court of Appeals, 279 F.3d 817, 824 (9th Cir. 2002) (recognizing “[f]utility of amendment” as a proper basis for dismissal without leave to amend)); see also Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 339 (9th Cir. 1996) (where amendment of litigant’s complaint would be futile, denial of leave to amend is appropriate).

**V.**

**CONCLUSION**

The Court submits this Report and Recommendation to United States District Judge Marilyn L. Huff under 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c)(1)(c) of the United States District Court for the Southern District of California. For the reasons outlined above, **IT IS HEREBY RECOMMENDED** that the Court issue an Order: (1) approving and adopting this Report and Recommendation, and (2) directing that Judgment be entered:

**DENYING** Defendants’ Motion to Dismiss as to Defendants Sowell and Thomas;

**GRANTING** Defendants’ Motion to Dismiss as to Defendants Levin, Scribner, Dexter, Holbrook and Bonnet;

**GRANTING** Defendants’ Motion to Dismiss as to Defendant DOE; and

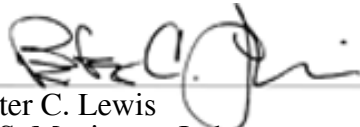
1       **DENYING** Plaintiff's Motion to Amend Name on Complaint.

2       **IT IS ORDERED** that no later than **March 4, 2009** any party to this action may file  
3 written objections with the Court and serve a copy on all parties. The document should be  
4 captioned "Objections to Report and Recommendation."

5       **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the  
6 Court and served on all parties no later than **March 18, 2009**. The parties are advised that  
7 failure to file objections within the specified time may waive the right to raise those objections  
8 on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9<sup>th</sup> Cir. 1998);  
9 Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991).

10       **IT IS SO ORDERED.**

11       DATE: February 11, 2009

  
Peter C. Lewis  
U.S. Magistrate Judge  
United States District Court

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15       cc:     The Honorable Marilyn L. Huff  
16             All Parties and Counsel of Record  
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